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No. 496.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

ERNEST BROOKS, HAROLD WILSON BROOKS and WALTER DOUGLAS BROOKS, as executors of the will of ERNEST AUGUSTUS BROOKS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Solicitor-General, on behalf of the Commissioner of Internal Revenue, seeks a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case on August 5th, 1932 (R., 49-50).

Opinions Below.

The opinion of the Board of Tax Appeals (R., 11-21) is reported in 22 B. T. A., 71.

The opinion of the Circuit Court of Appeals (R., 49) is reported in 60 Fed., 2nd, 890, Advance Sheets No. 4.

Question Presented.

The petitioner states that this question is whether under Sections 301, 302 and 303 of the Revenue Act of 1924 the gross estate of a non-resident decedent should include the value of intangible property, the physical evidences of which are actually present in the United States.

The opinion of the Court below shows that a more accurate statement of the issues which it determined is:

(1) Whether or not the estate tax imposed by the Revenue Act of 1924 applies (a) to shares of stock in a foreign corporation and (b) to bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and bonds of domestic municipalities, owned by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, where the paper evidences of such securities were located within the United States at the time of his death; and

(2) Whether or not the estate tax imposed by the Revenue Act of 1924 applies to a deposit by a *non-resident alien decedent*, not engaged in business in the United States at the time of his death, with the firm of Lawrence Turnure & Company, New York City.

Statement of Facts.

The respondents are the duly named, qualified and acting executors of the estate of Ernest Augustus Brooks, who died on October 31st, 1924 (R., 3 and 6, Petition and Answer below).

At the time of his death, Ernest Augustus Brooks was a resident of Cuba, and a citizen of Great Britain (R., 3 and 6, Petition and Answer below). He was not engaged in business within the United States (R., 8, Findings of Fact).

The decedent's last will and testament was executed in Cuba and filed in accordance with the Cuban statutes with a Cuban notary public. The respondents were named as executors in that will, which contained a direction, permissible under Cuban law, that administration of the estate be carried on without judicial intervention (R., 38-40).

At the time of his death, the decedent was the owner of shares of corporate stock and bonds as follows (R., 8, Findings of Fact; full list with values shown at R., 8, 9, 10 and 11):

Bonds of foreign corporations and accrued interest thereon of an aggregate value of	$ 24,384.97
Bonds of foreign governments and accrued interest thereon of an aggregate value of	55,610.49
Bonds of domestic corporations and accrued interest thereon of an aggregate value of	460,315.32
Bonds of a domestic municipality and accrued interest thereon of an aggregate value of	15,073.57
Stock in a foreign corporation of an aggregate value of	50,000.00

The paper evidences of part of the foregoing securities were in the possession of decedent's son, Ernest Brooks, in New York City. He collected the income therefrom and deposited the same in his father's bank account (R., 11, 33, 36).

The paper evidences of the remaining securities were in the possession of Lawrence Turnure & Company, in New York City. That firm collected the income therefrom and kept the same on deposit subject to decedent's check (R., 11, 33, 36).

These securities were not pledged, and were not held as security for any indebtedness (R., 11, 33, 35, 36).

The 666 shares of capital stock of the Central Romelie S. A. Cuba Joint Stock Co. were shares of stock in a Cuban corporation, organized under the laws of Cuba, operating a sugar business in Cuba (R., 33).

The foregoing securities were all included by the petitioner in the gross estate of the decedent (R., 11, Findings of Fact).

At the time of his death, decedent had a deposit account with the firm of Lawrence Turnure & Company, New York City. For some years prior to his death it was his custom to draw checks against that account, and such checks were honored by Lawrence Turnure & Company (R., 36, 37). The balance of $14,517.98 on deposit at the date of death was included by the petitioner in the gross estate of the decedent (R., 11, Findings of Fact).

The petitioner claimed a deficiency in estate tax of $24,865.88 based upon the inclusion of the foregoing items of property in the taxable estate (R., 5). The Board of Tax Appeals held that none of the foregoing securities or the foregoing deposit was properly included in the taxable gross estate and redetermined a deficiency of $1.79 (R., 21). The Court below has affirmed in all respects the holding of the Board of Tax Appeals (R., 49-50).

The Reasons for Denying the Writ.

The determination of the Court below is not in conflict with any decision of this Court or of any other Circuit Court of Appeals. It is in conformity with every other reported decision on the matters involved.

Estate of J. J. Garvan vs. *Commissioner,* 25 B. T. A., 612;

Shenton Executor vs. *United States,* 53 Fed., 2nd, 249;
Sanchez vs. *Bowers,* 57 Fed., 2nd, 324.

While, as urged by the petitioner, it may be that large amounts of money are involved in similar situations, that fact alone furnishes no reason for granting the writ herein, and it is not necessarily the fact that much litigation will follow the decision below if it is allowed to stand. As is hereafter shown, the Circuit Court of Appeals has correctly disposed of the issues in the case at bar and acceptance by the petitioner of such disposition would mean no further litigation except in cases presenting distinguishing features.

The petitioner is mistaken in his contention that the construction of the statute adopted by the Court below defeats the apparent purpose of Congress.

The relevant portions of that statute (Revenue Act of 1924, c. 234, 43 Stat., 253) are as follows:

> "Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or non-resident of the United States:
>
> (Here follow the rates.)
>
> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his

death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

* * * * * *

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

* * * * * *

(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States, * * *.

(e) The amount receivable as insurance upon the life of a non-resident decedent, and any moneys deposited with any person carrying on the banking business, by or for a non-resident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States. * * *"

Bearing in mind that the intangible property here involved consists of bonds of foreign corporations, foreign governments, domestic corporations, and a domestic municipality, stock in a foreign corporation, and monies due from a domestic debtor, the question presented to the Court below was:

Was any of the foregoing property owned by this non-resident decedent at the time of his death "situated in the United States"?

In considering this question a sharp distinction must be made between cases involving (a) the *common law rules* as to the situs of intangible property and those involving (b) *the power of a government to modify* the common law rules by statute. The phrase "situated in the United States" must be construed in the light of the common law rules, since Congress has in no way defined that phrase or attempted to modify the common law rules in so far as the property involved in the case at bar is concerned.

The common law rules with reference to the situs of property for purposes of taxation have been clearly established for many years, and have undergone only slight modification. Originally two rules were applied:

(a) Real property had its situs for taxation exclusively in the jurisdiction where it was located;

(b) Personal property, under the rule of *mobilia sequuntur personam* had its situs for taxation exclusively *at the domicile of its owner.*

The only modification of these two basic rules is one applying to *tangible personal property,* under which such property has a situs for taxation exclusively in the jurisdiction where it is located.

> *Frick* vs. *Pennsylvania,* 268 U. S., 473; 69 L. Ed., 1058.

As a result of this decision, the basic rules may now be stated as follows:

(a) *Tangible property* has its situs for taxation exclusively in the jurisdiction where it is located;

(b) *Intangible property* has its situs for taxation exclusively *at the domicile of its owner.*

Clearly, in the absence of a statute modifying these rules they are controlling, and they always have been except for the one modification above mentioned.

Railroad Company vs. *Pennsylvania* (*State Tax on Foreign-Held Bonds*), 15 Wall., 300; 21 L. Ed., 179;
Kirtland vs. *Hotchkiss,* 100 U. S., 491; 25 L. Ed., 558;
New Orleans vs. *Stempel,* 175 U. S., 309; 44 L. Ed., 174.

In *Railroad Company* vs. *Pennsylvania* (supra), cited with approval by Mr. Justice McReynolds in a majority opinion in *Farmers Loan & Trust Company* vs. *Minnesota,* 280 U. S., 204, the following appears at page 320:

> "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors, is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. *Their debts can have no locality separate from the parties to whom they are due.* This principle might be stated in many different ways, and supported by citations from numerous adjudications,

but no number of authorities and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement." (Italics ours.)

In *Kirtland* vs. *Hotchkiss* (supra), the State of Connecticut imposed a transfer tax on a debt owing to a resident of Connecticut by a resident of Illinois and secured by a mortgage on property situated in Illinois. The Supreme Court held that the tax was properly imposed because the debt was property in the hands of the creditor and was situated at the place of his domicile, namely, Connecticut.

In commenting on *Kirtland* vs. *Hotchkiss* (supra), the Supreme Court in *New Orleans* vs. *Stempel* (supra), stressed the necessity of a specific statutory provision in order to create a situs other than the domicile of the creditor in the following language at page 321:

> "It was assumed that the situs of such intangible property as a debt evidenced by bond was at the domicil of the owner. *There was no legislation attempting to set aside that ordinary rule in respect to the matter of situs.*" (Italics ours.)

The rules above enunciated apply equally to all forms of intangible property, including choses in action, shares of stocks and bonds.

> *Rhode Island Hospital Trust Company* vs. *Doughton*, 270 U. S., 69; 70 L. Ed., 475.

No distinction is made between specialty debts on the one hand and simple contract debts on the other.

> *Blodgett* vs. *Silberman*, 277 U. S., 1; 72 Law. Ed., 749.

In the light of the foregoing discussion, it is obvious that none of the property involved in the case at bar was "situated in the United States" at the time of the testator's death under the common law rules, and it is equally obvious that Congress has not attempted by the statute to create a situs for any of such property within the United States. The very provisions of the statute, which the petitioner argues evidence such an attempt (Petition, pp. 7 and 8), clearly show the contrary.

(1) It is provided in Section 303 (d) that stock in a domestic corporation *shall* be deemed property within the United States. No similar provision is made as to stocks in foreign corporations or bonds. The express inclusion of the one class of property obviously implies the exclusion of the others. *Expressio unius est exclusio alterius.* The argument of the petitioner that by the provision last referred to Congress intended to add to all intangibles, paper evidences of which are within the United States, the stock of domestic corporations, irrespective of the location of the certificates of stock, provokes the comment that if this were indeed the Congressional intent the language used is singularly inappropriate for the purpose. On petitioner's theory stock in a domestic corporation is "situated in the United States" if the stock certificates are here. If this be so, then what Congress would have done in order to bring all stock in domestic corporations within the statute would have been to insert a provision that stock in domestic corporations shall be deemed property within the United States in cases where the stock certificates are located elsewhere.

(2) It is provided in Section 303 (e) that "the amount receivable as insurance upon the life of a non-resident decedent shall *not* be deemed property within the United States."

The petitioner argues that the express exclusion of insurance (a type of intangible personal property) even though the debtor or the insurance policy might be in the United States, indicates an intent upon the part of Congress that intangible personal property generally should be included where the debtor, or the paper evidence of the debt is in the United States. This argument carries no weight when consideration is given to the history of this section, which was first introduced in the Revenue Act of 1921 as Section 403 (b) (3) of that Act, to *repeal* the following provision contained in Section 403 (b) (3) of the Revenue Act of 1918:

> "The amount receivable as insurance upon the life of a non-resident decedent, where the insurer is a domestic corporation, shall be deemed property within the United States."

There can be no doubt on this point, in view of the report of the Committee on Finance (Report No. 275, 67th Congress, First Session), with respect to the Revenue Act of 1921, which contains the following statement on page 25:

> "Section 403 (b) (3). Under existing law the proceeds of insurance upon the life of a non-resident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States."

In the light of this history of Section 303 (e) of the Revenue Act of 1924, it is evident that Congress re-

garded a tax upon insurance upon the life of a non-resident decedent as an *exception* to the general rule; otherwise, it would not have enacted the provision above quoted from the Revenue Act of 1918. In singling out such insurance and imposing a tax thereon, Congress must have intended to exclude from taxation all other intangible personal property belonging to non-resident decedents, whether or not the debtor or the evidence of the debt was in the United States. It seems clear that if Congress had intended to include and subject to taxation such other intangible personal property, it would have expressly so provided, as it did in the case of insurance by Section 403 (b) (3) of the Revenue Act of 1918, and as it did in the case of shares of stock of *domestic* corporations by Section 303 (d) of the Revenue Act of 1924.

These provisions with reference to insurance and shares of stock in domestic corporations indicate clearly that Congress intended the general rule (domicile of the owner) to apply to all other classes of intangible personal property.

(3) It is also provided in Section 303 (e) that "any moneys deposited with any person carrying on the banking business by or for a non-resident decedent who was not engaged in business in the United States at the time of his death shall *not* be deemed property within the United States."

It is argued from this provision that by expressly providing that the domicile of the debtor in such cases shall not be deemed the situs of the debt for purposes of taxation under the Act, Congress intended that as to all other debts the domicile of the debtor should be taken as the situs of the debt for the purpose of subjecting such other debts to taxation under the Act. There might be some force to such an argument if under the general

rule of situs a debt were situated at the domicile of the debtor, but the general rule, as already stated, is that the situs of a debt is at the domicile of the *creditor.* Therefore, the provision above quoted from Section 303 (e), instead of being an exception to the general rule, is merely an *express* application of the general rule to such bank deposits. It is well known that this provision, first inserted in the Revenue Act of 1921, was a response to expressed desires on the part of the banking interests to make this country a financial center by giving non-residents an *express* assurance that the maintenance of bank balances here would not involve a tax.

Furthermore, bank deposits are *sui generis.* While technically the relation between bank and depositor is merely that of *debtor and creditor,* the ownership of the moneys deposited being vested in the bank when deposited, this legal relationship has sometimes been ignored and the situation treated as if the depositor were the owner of moneys in the custody of the bank. In other words, a depositor is sometimes deemed to be the owner of the tangible property, i. e., the *specie* in the bank.

The provision above quoted from Section 303 (e) by providing that "moneys" deposited with any person carrying on the banking business by or for such non-resident decedent shall "not be deemed property" within the United States, in effect maintains the legal relationship between bank and depositor (that of debtor and creditor) in respect of such bank deposits. Under this section such bank deposits cannot legally be treated as tangible property belonging to the depositor.

The inclusion of these three provisions in the statute is consistent only with the theory that Congress intended that the rules of the common law should apply in all other respects in the determination of whether or not any item of property owned by a non-resident decedent is situated within the United States.

The petitioner argues that the purpose of Congress to reach the transfer of every kind of property within its power is evidenced by the existence at the time the statute was enacted of the decisions in *Eidman* vs. *Martinez*, 184 U. S., 578; *Wheeler* vs. *Sohmer*, 233 U. S., 434, and *De Ganay* vs. *Lederer*, 250 U. S., 376. In the Eidman case the Court failed to find in the inheritance tax law contained in the War Revenue Act of 1898, an intention to base a tax upon bonds of the non-resident alien, the physical evidences of which were in the possession of the alien's agent in the United States. The actual holding in the case was purely one of statutory construction and the dictum as to the power of the Legislature was absolutely unnecessary to the decision. This case recognizes the necessity of clear evidence of intent in the statute. The Wheeler cases recognizes the doctrine that for purposes of taxation the common law rule of situs applies *in the absence of a statutory enactment*, but stood for the proposition (now rejected) that a State could create an additional situs by statute. If Congress had had the Eidman and Wheeler cases in mind at the time of enacting the Revenue Act of 1924 and had intended to subject to tax intangibles such as those involved in the case at bar, it would certainly have realized the necessity of incorporating in the Act provisions clearly establishing such intent, and since such provisions are not found in the Act, the conclusion is irresistible that Congress could only have intended that the common law rule should apply. *De Ganay* vs. *Lederer* is not in point because it is an income tax case and deals with the income from property having a business situs in the United States.

The petitioner's argument that Congress in enacting the Revenue Act of 1924 impliedly adopted the regulations under prior and similar acts is not convincing. In so far as bonds are concerned the regulations adopted

a theory contrary to the common law rule (Article 53 of Treasury Regulations 63, Revenue Act of 1921). By their silence as to stock of foreign corporations they adopted the common law rule. There is certainly no warrant in the statutes preceding the 1924 Act for any such distinction. It is, therefore, impossible to place any reliance upon the theory of a legislative adoption. Further, that theory must be limited to regulations which are consistent with the statute and not such regulations as are clearly contrary to it.

Since the statute evidences affirmatively the intent of Congress *not* to subject to the tax intangibles of the classes here involved, it follows that there cannot be found in the statute any clear evidence of an intent by Congress to subject such intangibles to the tax and that, therefore, they are not reached by the statute.

> *Gould* vs. *Gould,* 245 U. S., 151, 153; 38 S. Ct., 53; 62 L. Ed., 211.

The petitioner concedes that the recent decisions of this Court in *Farmers Loan & Trust Company* vs. *Minnesota,* 280 U. S., 204; *Baldwin* vs. *Missouri,* 281 U. S., 581; *Beidler* vs. *South Carolina Tax Commission,* 282 U. S., 1; and *First National Bank of Boston* vs. *Maine,* 284 U. S., 312, have raised doubt as to the power of Congress to include in the gross estate intangibles of non-resident decedents. All that is novel in the decisions in the four cases last mentioned is that they repudiate the doctrine exemplified in *Blackstone* vs. *Miller,* 188 U. S., 189, that a State may by statute create a situs for intangibles other than or in addition to the domicile of the owner. All four of those recent cases in declaring that it is not competent for the States to establish by statute any situs for intangibles other than the domicile of the owner emphasize and reiterate the rule laid down in *State Tax on Foreign-Held Bonds,* supra, *Kirtland* vs.

Hotchkiss, supra, and *Buck* vs. *Beach,* 206 U. S., 392, 51 L. Ed., 1106, that the common law situs of intangibles is at the domicile of their owner. The doubt expressed by the petitioner as to the power of Congress to tax the intangibles here involved is a conviction with the respondents. This conviction is supported by the decisions of this Court, most of them of very recent date.

In *State Tax on Foreign-Held Bonds,* supra, the Supreme Court said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

While the above decision related to power of a State to tax, the rule applies with equal force to the Federal Government. *Heiner* vs. *Donnan,* 76 L. Ed. (Adv. Sheets), 501. This decision declared unconstitutional a provision of the Revenue Act of 1926 purporting to establish a conclusive presumption that transfers made within two years prior to death shall be deemed to have been made in contemplation of death. In so doing, the Supreme Court followed *Schlesinger* vs. *Wisconsin,* 270 U. S., 230, which declared a similar provision in a State statute unconstitutional. The opinion in the Heiner case reads, at page 506:

> "Nor is it material that the 14th Amendment was involved in the Schlesinger Case, instead of the 5th Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge vs. Long, 282 U. S., 582, 596, 75 L. Ed., 562, 566, 51 S. Ct., 306.

That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols vs. Coolidge, 274 U. S., 531, 542, 71 L. Ed., 1184, 1192, 52 A. L. R., 1081, 47 S. Ct., 710; Brushaber vs. Union P. R. Co., 240 U. S., 1, 24, 25, 60 L. Ed., 493, 504, 36 S. Ct., 236; Tyler vs. United States, supra (281 U. S., p. 504, 74 L. Ed., 998, 69 A. L. R., 758, 50 S. Ct., 356)."

The record here stands undisputed that the decedent was not within the jurisdiction of the United States and that neither he nor his property was engaged or employed in business here. *Farmers Loan & Trust Company* vs. *Minnesota*, supra; *Baldwin* vs. *Missouri*, supra; *Beidler* vs. *South Carolina Tax Commission*, supra, and *First National Bank of Boston* vs. *Maine*, supra, have finally and definitely established that for purposes of taxation the exclusive situs of intangible personal property is the domicile of the owner. Under these decisions the intangibles here in question were not within the jurisdiction of the United States.

Their transmission upon the death of this non-resident alien is no more subject to the taxing power of the United States than is the transmission of his Cuban real property. The following language found at pages 326 and 327 of the *Maine* case (supra), although written with relation to the power of a State of the Union to tax the transfer of intangibles of a decedent not resident in that State, is of equal cogency when applied to the power of the United States to tax the transmission of intangibles belonging to a decedent who was neither a citizen nor a resident of the United States:

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance

tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

"The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.

"In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. * * *

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; * * *."

The cases of *United States* vs. *Bennett*, 232 U. S., 299 and *Cook* vs. *Tait*, 265 U. S., 47, upon which the petitioner relies to oppose the foregoing argument, both involve the power of the United States to tax its own citizens, and, therefore, neither of them is applicable to the situation here presented because the decedent was not a citizen of the United States.

WHEREFORE it is respectfully submitted that the petition should be denied.

November, 1932.

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